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SUPREME COURT OF THE UNITED STATES

No. 1420

D. M. PICTON & CO., INC.,
Petitioner,

versus

W. K. EASTES, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO U. S. CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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Index to Subject Matter.

Argument.

Citations.

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Statement of the Case.

The Superior Oil Company (hereinafter called "Superior") constructed on piling driven in the Gulf of Mexico, a mile or two from the nearest shore line, an oil well drilling platform entirely surrounded by public, navigable waters, and in nowise connected with the shore.

Lightning struck, set fire to and otherwise damaged this platform, the piling upon which it rested, and certain machinery which had been on the platform.

On September 22, 1941, D. M. Picton & Co., Inc., petitioner for writ and hereinafter called "Picton" entered

into a contract with Superior, "Picton-3" (Tr. 566, 567, 568) which provided that Picton:

> "* * * pull and remove all piling and timbers damaged and destroyed by lightning and fire at the site of the Creole Drilling Platform, in the Gulf of Mexico, Cameron Parish, Louisiana * * *.
>
> "That all of the salvage material will be delivered either upon barge or dock at Lake Charles, Louisiana, as designated by this company * * *.
>
> "That weather permitting * * * all of the work of salvaging said property and delivering said property same as above shall be completed within (30) working days * * *".

In carrying out this contract, Picton transported, entirely by barge on public waters, some 279 tons of material, a distance of about 30 miles.

On November 29, 1946, Picton rendered a bill (Picton-6, Tr. 572) to Superior reading:

> "To services of Derrick Barge Robert, Barge DMP. No. 13 and 11, and Tug Picto recovering, salvaging and transporting to our properties at Sabine, Texas, and unloading all salvaged machinery and removing all piling and timber which were damaged by fire at above drilling platform . . . $9,850.00."

Picton admitted payment by Superior of this bill. (Par. XVII of Picton's answer, Tr. 12, 26).

Picton failed to remove one of the submerged piling, and W. K. Eastes, et al., libelants, owners of the motor boat "Tramp", alleging that their boat ran into and was sunk by a submerged piling, which Picton was obligated to remove under the above mentioned contract, brought this action in admiralty, against Picton and Superior, to recover for damages done this boat and for loss of earnings while the boat was being repaired.

Superior impleaded Picton under the Fifty-sixth Rule in Admiralty, and asked that in the event judgment went against Superior, it have judgment over against Picton, as contemplated damages for Picton's failure to pull and remove the submerged piling, which could have been located only by the use of a boat with a drag, and by sending down a diver in case the drag caught on some obstruction.

Judgments of the Lower Courts.

The District Court found that the "Tramp" was sunk by a submerged piling, which Picton under its contract was obligated to remove, rendered judgment *in solido* against Picton and Superior for $7,580.65, with interest and a proctor's fee of $100.00.

Judgment in a like amount was awarded Superior against Picton, for breach of contract to remove the submerged piling, the court holding such damages were reasonably in contemplation of the parties. 65 Fed. Sup. 996.

The Circuit Court of Appeals affirmed this judgment. 160 Fed. (2d) 189.

ARGUMENT.

May It Please the Court:

I.

The contract between Superior and Picton was wholly maritime.

The contract provided for the removal of damaged piling and timbers, constituting a menace to navigation, from the waters of the Gulf of Mexico, and the transportation by water of the salvage, consisting of some 279 tons, a distance of many miles.

The drilling platform, of which the damaged piling and timber were a part, was located in the Gulf of Mexico, where boats frequently plied, a mile or two from shore, and not connected therewith.

We find no conflict in the decisions as to the maritime nature of the contract in question, believe no such decisions are cited by petitioner, and submit the following authorities as holding the contract wholly maritime:

Berwind-White Coal Mining Co. v. City of New York, (U. S. Cir. Ct. of App. (2nd) Cir. 1943) 135 Fed. (2d) 443, *447*.

1 Benedict on Admiralty, Sec. 66, p. 137;

2 C. J. S. Admiralty, Sec. 30, p. 90;

Krauss Bros. Lmbr. Co. v. Dimon S. S. Corp., 1933, 290 U. S. 117, 54 S. Ct. 105, 78 L. Ed. 216;

F. S. Royster Guano Co. v. W. E. Hedger Co., Inc., (2 Cir., 1931), 48 F. (2d) 86.

The respondent does not contend that a contract is maritime merely by reason of its performance on navigible

waters. No such contention was made in the lower courts, and the lower courts made no such holding.

It is simply contended that the removal from the Gulf of Mexico of hazards to navigation, such as submerged piling, and the transportation by vessels of certain materials is a maritime contract.

II.

If that part of the contract, having to do with removal of the damaged piling, a hazard to navigation, was not maritime, the remainder and principal part of the contract being admittedly maritime, admiralty had jurisdiction to implead Picton on the incidental part of the contract.

The lower courts having held the contract was wholly maritime, there was no necessity for them to pass upon this contention, and no holding was made on it.

This Court and other authorities fully sustain this principle.

Vol. 1, Benedict on Admiralty, Sec. 63, p. 128;

Union Fish Co. v. Erickson, (9 Cir., 1916), 235 F. 385; 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261;

The Thomas P. Beal, D. C. 295 F. 877;

North Alaskan Salmon Co. v. Larsen, 9 Cir., 220 F. 93;

Rosenthal, et al., v. The Louisiana, C. C. La., 37 F. 264-5;

Grunvold, et al., v. Suryan, D. C., 12 F. Supp. 429.

III.

The Supreme Court of the United States will not grant a writ of certiorari to review the evidence or the inferences that may be drawn from it.

In its application for a writ Picton urges that the Circuit Court of Appeals erred in finding, from the evidence, that it was in reasonable contemplation of the parties, that damages be paid for breach of the contract to remove the submerged piling.

Petitioner urges that because Picton refused to execute the contract and furnish a performance bond, and the contract was later accepted by Superior without the bond, those facts show damages for breach of the contract were not in contemplation of the parties.

We can find no such holding by any court.

The reason that Superior accepted the contract without a performance bond is that Picton is highly responsible financially, and a performance bond would not have added to the security of Superior. (Tr. 436).

The Supreme Court of the United States will not grant a writ of certiorari to review the evidence or the inferences to be drawn from it.

General Talking Pictures Corp. v. Western Electric Co., (1938) 304 U. S. 175; 82 L. Ed. 1273.

The award in favor of Superior and against Picton is amply supported by:

Twachtman v. Connelly, 6 Cir., 106 F. (2d) 501;

25 C. J. S., Damages, Sec. 24, p. 481;

Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265;

Missouri v. Morris, 8 Cir., 243 F. 481.

IV.

Superior was not estopped to claim damages from Picton, for the latter's breach of contract to remove the submerged piling.

Picton urges that because Picton advised it had completed its work under the contract; that thereupon Superior paid for the work, and because Superior did not discover the submerged piling, which was several feet under the water, (Tr. 183, 214, 232, 293) Superior was negligent, and cannot recover from Picton.

Both lower courts discussed the evidence, and found that as between Picton and Superior, the latter was guilty of no negligence in not discovering the piling before the accident.

As noted, this Court will not grant a writ of certiorari to review a finding of facts.

General Talking Pictures Corp. v. Western Electric Co., supra.

V.

There is no principle in admiralty which requires that when two persons are cast jointly and *in solido* in favor of a libelant, the two respondents must divide the damages between them.

The enforcement of such principle would do away with the conceded rule, enforcible in admiralty, that one who violates a contract is liable for contemplated damages.

The doctrine of contribution enforced in admiralty against joint tort feasors, was adopted from equity, and is simply based on considerations of good conscience, that is, if two joint tort feasors, *equally at fault as between themselves*, caused damage, they must share the loss.

Practically all cases involving contribution in admiralty have been collision cases, where the two vessels were equally guilty of causing damage. *De Las Casas v. The Alabama*, 92 U. S. 695; 23 L. Ed. 763, cited by Picton.

The Wonder, 79 Fed. (2d) 312, cited by Picton, is an exception. In this case, The Wonder sued the City of New York for damages done the vessel when its propeller caught in a submarine cable lying in the river above the bottom of the river, instead of below its bed as required by the United States Army engineers.

The contractor installing the cable contracted to install it in accordance with the Army's requirements.

After the contract was completed, and before the accident, the City knew of the hazard to navigation caused

by the improper placing of the cable, and the Court held each liable for the damage.

Had Superior known of the existence of the submerged piling, after the completion of Picton's contract, and permitted it to remain, these facts would have brought this case under the rule of the *Alabama* case.

The Supreme Court said in the *Alabama* case, that if the City had been without knowledge of the hazardous cable in the river after its contractor had finished the work, there would have been no contribution by the City, the Court citing in support of its reasoning, *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316; 16 S. Ct. 564; 40 L. Ed. 712.

In the *Washington Gaslight Co.* case, the Court, in holding the District could recover from the gas company, said:

> "When the offense is merely *malum prohibitum*, and in no sense immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties were wrongdoers."

Like the District in the case just cited, and unlike the City of New York in The Wonder, *supra*, cited by petitioner, Superior had no knowledge of the submerged piling, and was not negligent, under the evidence, in not having such knowledge.

The decision of the Circuit Court of Appeals is correct, is in accordance with the decisions of this Court, and no ground exists for the issuance of a writ of certiorari.

Respectfully submitted,

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